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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)

Application for Renewal of Broadcast Station)
License of)

Fox Television Stations, Inc.)

For Renewal of Station License WWOR-TV,)
Secaucus, New Jersey)

File No.

BRCT-20070201AJT

OPPOSITION TO PETITION TO DENY

of /

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SUMMARY

Fox has paid close attention to community needs and provided exemplary service to the residents of northern New Jersey since it acquired WWOR-TV six and one-half years ago. In particular, the station airs a one-hour nightly newscast each day, and broadcasts one hour of public affairs programming each week. Collectively, these programs spend a substantial amount of time covering issues of importance to WWOR-TV's New Jersey viewers. As but one example, the station airs *New Jersey Now*, a weekly one-half hour program providing interviews with state and local elected leaders and political candidates. WWOR-TV also offers viewers a wide variety of entertainment programming and serves as the free, over-the-air home for the New Jersey Nets basketball team. In addition, in recent years the station has provided game coverage for sports teams from local universities Rutgers and Seton Hall.

Notwithstanding the station's record of service to New Jersey, Voice for New Jersey (the "Petitioners") filed a petition to deny the station's license renewal application, alleging that WWOR-TV has failed to serve the needs of its community. The *Petition*, however, relies on subjective assessments of the station's news coverage and is based on only a selective – and faulty – review of the station's record. Accordingly, the *Petition* cannot possibly meet the high burden imposed by the Commission on those seeking to challenge renewal applications on the basis of a licensee's content selection.

First, the *Petition* intrudes on vital constitutional principles that protect a free press from governmental interference. Indeed, the Commission has long made clear that it will not sit in judgment of a licensee's editorial choices, and that the First

Amendment provides licensees with broad discretion to select what programs and issues to cover on their stations.

Equally important, the Petitioners appear fundamentally to misapprehend the legal standard applicable to review of WWOR-TV's renewal application. The *Petition* argues that the station should be subject to heightened scrutiny to determine whether it has adequately served New Jersey viewers. The Commission, however, already has had opportunity to consider and reject this very argument, making clear that WWOR-TV's "obligation to serve the issues and concerns of northern New Jersey is not different in kind or degree from any licensee's obligation to service its community of license." In any case, WWOR-TV's record of service to New Jersey leaves no doubt that it has provided a substantial amount of issue-responsive programming specifically targeted toward viewers in the state.

Finally, the Petitioners' specific criticisms of WWOR-TV's coverage over the past six and one-half years can easily be dismissed. To the degree that the *Petition* finds fault in the station's election coverage, its analysis is based on patently inadequate monitoring of WWOR-TV's programming – the Petitioners rely on a study that evaluated just 30 days of regularly-scheduled newscasts (out of thousands of hours news programming) and that excluded entirely every other type of election coverage, including WWOR-TV's public affairs programs. Likewise, the news programming analyzed by Petitioners during a 12-day window in April 2007 constitutes far too limited an amount of time to serve as the basis for conclusions about WWOR-TV's overall record. In any event, despite the flaws inherent in the *Petition*'s analysis, even the Petitioners' own data

confirms that the station provided ample coverage of New Jersey elections and other local issues during the limited periods of review.

The Petitioners fare no better in their attempt to calculate the precise number of the station's news stories related to New Jersey based solely on an examination of issues/programs lists and local service reports. Most critically, the Petitioners incorrectly assume that the issues/programs lists constituted an exhaustive recount of every single story aired by WWOR-TV, when in fact the lists were only meant to be exemplary of the station's efforts. The Petitioners' flawed analysis also defies logic, for it classifies any story that did not take place within the geographic boundaries of New Jersey as irrelevant to the station's effort to serve viewers in the state. Quite clearly, though, coverage of important regional, national and international issues is responsive to the needs and interests of New Jersey residents. Regardless, even the unduly narrow analysis conducted by the Petitioners reveals that WWOR-TV broadcast more than 1,000 New Jersey-focused news stories over its most recent license term – clearly more than a “nominal” amount that would call into question whether the station defaulted on its obligation to serve its community.

In sum, the *Petition* fails to allege a prima facie case that WWOR-TV's overall programming effort falls short of its public interest obligation. Not only does the *Petition* conflict with critical First Amendment principles, it also attempts to evaluate WWOR-TV based on erroneous assumptions and an entirely too limited review of the station's record. When all of Fox's efforts to serve New Jersey viewers are taken into account, there can be no question that WWOR-TV is deserving of renewal, and the *Petition* should be dismissed.

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EXHIBITS

A – Declaration of Molly Pauker, Vice President of Fox Television Stations, Inc.

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Secaucus, New Jersey)	

OPPOSITION TO PETITION TO DENY

Fox Television Stations, Inc. ("Fox"), licensee of television station WWOR-TV, Secaucus, NJ, hereby submits its Opposition to the Petition to Deny the above-captioned renewal application, filed April 30, 2007 by Voice for New Jersey (the "Petitioners"), which raises questions concerning Fox's service to its New Jersey viewers.¹

I. WWOR-TV HAS PROVIDED EXEMPLARY SERVICE TO NEW JERSEY, BROADCASTING A SUBSTANTIAL AMOUNT OF PROGRAMMING SPECIFICALLY TARGETING VIEWERS IN THE STATE

Fox takes seriously its obligation to provide programming that meets the tastes, needs and interests of viewers in northern New Jersey, and in particular, to keep New Jersey citizens informed by broadcasting important local news and informational programming. Since Fox acquired WWOR-TV in July 2001, the station has dedicated substantial resources to producing programming specifically targeting the various New

¹ See *In re Application for Renewal of Station License of WWOR-TV, Secaucus, NJ*, File No. BRCT-20070201AJT, Petition to Deny, filed April 30, 2007 (the "Petition").

Jersey communities that comprise the station's service area. WWOR-TV airs a one-hour nightly newscast that devotes a significant amount of time to covering issues relevant to New Jersey viewers. The station also airs two half-hour public affairs programs each week, which focus heavily on New Jersey issues.

New Jersey Now, for example, features interviews with state and local politicians, including members of the General Assembly, state senators and candidates for local positions such as Board of Education. The interviews give viewers a chance to hear from their elected representatives and political analysts, who address key issues and developments related to northern New Jersey. (*New Jersey Now* is an off-shoot of the *Ask Congress* program, which aired on WWOR-TV in 2006 and featured interviews with nine of New Jersey's 13 U.S. Representatives (all were invited) and both of its U.S. Senators.) A separate public affairs program – *Real Talk* – also uses an interview format to provide viewers with access to civic and community leaders; recent programs featured representatives of Newark Now, an organization devoted to helping city residents transform their communities through neighborhood-based collaboration.

WWOR-TV also provides New Jersey viewers with a wide variety of entertainment and sports programming – including serving as the free, over-the-air home of the New Jersey Nets basketball team and providing nearly 20 over-the-air broadcasts of Major League Baseball games featuring the Yankees, who are beloved as a home team throughout northern New Jersey. In recent years the station has broadcast numerous Big East Conference football and basketball games featuring New Jersey schools Rutgers and Seton Hall as well. And aside from sports programming, in the last two years alone WWOR-TV has broadcast more than 20,000 public service announcements (“PSAs”) for

a variety of causes, including the Boys & Girls Clubs of New Jersey and CASA of New Jersey, which advocates for abused and abandoned children in proceedings before state courts. WWOR-TV personnel, including on-air talent, regularly volunteer for charitable causes and participate in local events across northern New Jersey.

Notwithstanding the station's exemplary record of service to northern New Jersey, the Petitioners allege, on the basis of limited analysis, erroneous assumptions and faulty legal conclusions, that WWOR-TV has failed to serve the needs of its community. The Petitioners pay scant attention to WWOR-TV's public affairs programs, however, and they wholly ignore the station's other programming that quite clearly is responsive to the needs and interests of New Jersey residents. In short, the *Petition*'s selective examination of the station's programming, and its subjective review of the station's performance, cannot serve as the basis for a challenge to WWOR-TV's license renewal application.

In advancing their unsupported contentions, the *Petition* profoundly encroaches on the First Amendment and the critical constitutional tenets that protect a free press from government interference. The *Petition* essentially asks an agency of the federal government to sit in review over the editorial choices that WWOR-TV's journalists have made in covering the news of not only New Jersey, but also the entire tri-state area within the reach of the station's signal. The Commission and the courts, however, have consistently recognized that the Constitution provides broadcast licensees extraordinarily wide discretion when it comes to making editorial decisions about the selection of informational programming. It is this bedrock principal – that government should not play any role in the selection or presentation of news – which has nurtured the

growth and development of the vibrant and competitive press essential to an informed citizenry and to democracy. The Petitioners would sweep away these fundamental and venerable constitutional precepts and in their place force the Commission into the role of news editor.

Fortunately, the Commission, which has seen this argument many times before, has steadfastly refused to allow the renewal process to be used as a referendum on a station's news coverage, or to undermine broadcasters' constitutional right to editorial freedom. Indeed, during the last renewal cycle for television stations in Colorado, the Commission rejected a petition to deny that made allegations very similar to those raised by the Petitioners here: "Because journalistic or editorial discretion in the presentation of news and public information is the core concept of the First Amendment's Free Press guarantee, licensees are entitled to the widest latitude of journalistic discretion"²

The *Petition*, moreover, appears to be based largely on a misapprehension about the legal standard applicable to WWOR-TV's license renewal application. The *Petition* asserts that the station has "additional, unique obligations to New Jersey" above and beyond the obligations that any licensee has to serve the public.³ The Commission has made quite clear, however, that WWOR-TV will be "judged in the same manner as any other television station in its overall performance"⁴ The *only* difference applicable to WWOR-TV relates to the geographic scope of its obligations: the station

² Letter to Dr. Paul Klite, et. al. from Barbara Kreisman, Chief, Video Services Division, Mass Media Bureau, 12 Comm. Reg. (P&F) 79 (1998) (*aff'd sub nom In re McGraw-Hill Broadcasting Co., Inc., et.al.*, Memorandum Opinion & Order, FCC 01-356 (2001)).

³ *Petition*, at 15.

⁴ *In re RKO General, Inc.*, 1 FCC Rcd 1081, 1086 (1986).

will be reviewed based on its service to multiple communities in northern New Jersey, not merely Secaucus (its community of license). Any “uniqueness” applicable to review of WWOR-TV’s programming “arises from the different ‘community’ to be served. Nothing . . . gives the Commission the right or obligation to second-guess the program content or the editorial discretion of this or any other licensee.”⁵

In any case, even a cursory evaluation of Fox’s record as licensee of WWOR-TV reveals that the station has fulfilled its obligation to provide programming responsive to the issues and concerns of northern New Jersey residents. The station’s issues/programs lists, together with its annual reports detailing its exceptional level of commitment to its New Jersey viewers, demonstrate that WWOR-TV has broadcast literally thousands of stories specifically focused on New Jersey issues. And contrary to the Petitioners’ assumptions, both the issues/programs lists and the New Jersey reports are merely exemplary of the station’s overall efforts; the reports do not attempt to catalogue comprehensively every single story or issue that received coverage on WWOR-TV over the course of Fox’s six and one-half years as licensee. Thus, the Commission should discard the Petitioners’ subjective and incomplete “analysis” that purports to derive the precise number of WWOR-TV’s New Jersey-specific news stories based solely on a review of issues/programs lists.⁶

Given the clear constitutional dictates and the Petitioners’ erroneous assumptions, the Commission should reject the *Petition* and, in light of Fox’s record of

⁵ *Id.*

⁶ *See Petition*, at 6-9.

service to communities across northern New Jersey, grant WWOR-TV's application for renewal.

II. THE *PETITION* FAILS TO RAISE A PRIMA FACIE CASE THAT WWOR-TV HAS NOT SERVED THE PUBLIC INTEREST

A. Given the Critical First Amendment Implications, a Petition to Deny that Makes Allegations Concerning Programming Choices Faces a Particularly High Burden

According to Section 309(k)(1) of the Communications Act, the Commission shall grant a station renewal of its broadcast license:

[I]f it finds, with respect to that station, during the preceding term of its license –

- (A) the station has served the public interest, convenience, and necessity;
- (B) there have been no serious violations by the licensee of this chapter or the rules and regulations of the Commission; and
- (C) there have been no other violations by the licensee of this chapter or the rules and regulations of the Commission which, taken together, would constitute a pattern of abuse.⁷

The Commission considers petitions to deny applications for the renewal of a license under a two-step test. First, the Commission determines whether the petition “demonstrates by specific allegations of fact that grant of the application would be prima facie inconsistent with the public interest.”⁸ If the answer is no, the petition must be rejected without a hearing. Second, if a petitioner makes a sufficient prima facie case, the Commission examines whether a “substantial and material question of fact is presented to warrant further inquiry in a hearing.”⁹ Again, if the answer is no, the Commission must

⁷ 47 U.S.C. § 309(k)(1).

⁸ *Letter to Dr. Paul Klite, et. al.*, 12 Comm. Reg. (P&F) at 81 (citing *Astroline Communications Co. v FCC*, 857 F.2d 1556 (D.C. Cir. 1988)).

⁹ *Id.*

grant the application without a hearing.¹⁰ Even under ordinary circumstances, this two-step inquiry imposes a “significantly heighten[ed] . . . burden” for a petition to satisfy before being entitled to a hearing.¹¹

With respect to allegations against a renewal application that implicate the content of a licensee’s programming, however, the Commission has made clear that a petition to deny faces an especially heavy burden. “[B]ecause news and comment programming are at the core of speech which the First Amendment is intended to protect, we have long believed that a particularly high threshold should govern Commission intervention in this area.”¹² If a petitioner alleges that licensees have failed to present locally responsive programming, the petitioner faces “a heavy burden to show that licensees have abused their discretion.”¹³

¹⁰ See 47 U.S.C. § 309(d)(2). As the D.C. Circuit has explained, at the first step, “the Commission’s inquiry . . . is much like that performed by a trial judge considering a motion for a directed verdict: if all the supporting facts alleged in the affidavits were true, could a reasonable factfinder conclude that the ultimate fact in dispute had been established.” At the second step, a substantial and material question is raised when “the totality of the evidence arouses a sufficient doubt on the [question whether grant of the application would serve the public interest] that further inquiry is called for.” *Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quotations omitted).

¹¹ *Gencom, Inc. v. FCC*, 832 F.2d 171, 180 (D.C. Cir. 1987).

¹² *In re Liability of NPR Phoenix, L.L.C.*, 13 FCC Rcd 14070, 14072 (1998).

¹³ *Letter to Dr. Paul Klite, et. al.*, 12 Comm. Reg. (P&F) at 82. See also *In re CIA, et. al.*, 58 Rad. Reg. 2d 1544, 1549 (1985) (“We possess neither the expertise nor the desire to look over the shoulder of broadcast journalists and inquire why a particular piece of information was reported or not reported” since “such choices are the very essence of the journalistic process. The profound potential for direct intrusion upon first amendment rights in this area is clear; thus, the heavy burden we have placed upon complainants who assert violations of our news distortion policy. A lesser burden would jeopardize free and independent news coverage.”)).

In particular, because the Commission is prohibited “from censoring broadcast matter or directing licensees in the selection or presentation of broadcast material,” a petition to deny can “make a prima facie case” only if it includes “specific allegations of fact which, if true, would establish that the licensee’s *overall* past programming could not reasonably have met the needs and interests of the people within [its] service area”¹⁴ It cannot merely allege that a licensee has failed to cover certain events that the petitioner deems important,¹⁵ for a “licensee is under no obligation to cover each and every newsworthy event which occurs within a station’s service area.”¹⁶ In fact, because a licensee has “broad discretion to choose, in good faith, which issues are of concern to the community . . . [t]he Commission will not interfere with the broadcaster’s judgment without a showing that the broadcaster was unreasonable or discriminatory in its selection of issues” or unless “the licensee has offered such nominal levels of issue responsive programming as to have effectively defaulted on its obligation to the discussion of issues facing its community.”¹⁷ The FCC has emphasized that a petitioner has a “heavy burden” to show that a licensee has abused its discretion.¹⁸

The *Petition*, based on an extremely limited review of WWOR-TV’s programming, plainly fails to satisfy the threshold requirement for a petition to deny.

¹⁴ *In re Dena Pictures, Inc., et. al.*, 71 F.C.C. 2d 1402, 1405 (1979) (citation omitted) (emphasis supplied).

¹⁵ *See id.*

¹⁶ *In re American Broadcasting Companies, Inc.*, 83 F.C.C. 2d 302, 305 (1980) (citation omitted).

¹⁷ *In re: License Renewal Applications of Certain Commercial Television Stations Serving Philadelphia, Pennsylvania*, 5 FCC Rcd 3847, 3847-48 (1990).

¹⁸ *Id.*

B. The *Petition*'s Selective and Subjective Review of WWOR-TV's Programming Raises No Prima Facie Question as to the Station's Service to Northern New Jersey

The Petitioners essentially level three related criticisms at WWOR-TV's service to New Jersey: 1) the station allegedly failed to provide a sufficient amount of coverage of New Jersey elections over the course of the 30 days leading up to the November 2005 state elections; 2) the station's 2006-07 issues/programs lists allegedly reflect a quantity of news coverage inadequate to serve WWOR-TV's community; and 3) the station's newscasts during approximately 12 days in April 2007 allegedly contained too few New Jersey-centric stories.¹⁹ None of these criticisms is sufficient for Petitioners to make a prima facie case against WWOR-TV's renewal application, however.

First and foremost, the *Petition* gives scant attention to Fox's other programming efforts on WWOR-TV, instead assuming that the entirety of the station's efforts should be evaluated on the basis of newscasts alone. The Petitioners never allege – as they must to make a prima facie case – that Fox has failed in its *overall* programming to serve New Jersey viewers throughout the last six and one-half years. Nor could they, given the volume of news and information broadcast on WWOR-TV that would be responsive, by any characterization, to the needs and interests of New Jersey viewers.

Indeed, the *Petition* itself contains nearly 100 pages of exhibits, which collectively reveal the breadth of stories that even the Petitioners acknowledge to be specifically targeted to New Jersey.²⁰ The simple fact is that since Fox became the

¹⁹ See, e.g., *Petition*, at 2.

²⁰ See *id.* at Exhibits A-D.

licensee of WWOR-TV in 2001, the station has broadcast more than 2,000 hours of regularly-scheduled local newscasts as well as more than 200 hours of public affairs programming, not to mention scores of hours of public service announcements (“PSAs”) and breaking news alerts and updates.²¹ And even aside from informational programming, the station broadcasts a variety of entertainment and sports programming – including serving as the over-the-air home of the New Jersey Nets and Major League Baseball games featuring the Yankees (a team that counts among its fans a great number of New Jersey residents) and airing numerous Big East Conference football and basketball games featuring New Jersey schools Rutgers and Seton Hall as well.²²

As noted above, the Commission has made clear that a licensee has “broad discretion” in the selection of programming to serve the needs of its community, and it is simply not possible for even the Petitioners to claim that WWOR-TV’s thousands of hours of programming constitutes “nominal” levels of issue-responsive programming.²³ The Petitioners may not agree with every editorial choice made by the news editors at WWOR-TV, but that difference of opinion cannot serve as the basis for a petition to deny. Given that the *Petition* does not offer any analysis of the station’s overall record, the Petitioners have failed as a matter of law to make a *prima facie* case against WWOR-TV. Accordingly, the *Petition* should be dismissed.

²¹ See Declaration of Molly Pauker, Vice President, Fox Television Stations, Inc., attached hereto as Exhibit A.

²² See *id.*

²³ See *In re License Renewal Applications*, 5 FCC Rcd at 3847-48.

C. The Commission Has Been Resolute in Rejecting Petitions to Deny That Seek to Embroil the Government in Choices About Broadcast Content

Quite apart from its lack of record support, the *Petition* seeks relief that the Commission may not constitutionally grant. The Petitioners essentially ask the Commission, an agency of the federal government, to evaluate the content of WWOR-TV's newscasts in order to determine whether the station broadcast sufficient amounts and types of programming.²⁴ If the Commission were to heed this request, it necessarily would result in the government having to choose for itself what stories are worthy of coverage and, in turn, what viewpoints are worthy of dissemination. In short, grant of the *Petition* would pose a very real threat of government control over the free marketplace of ideas.

The First Amendment protects the press from government oversight, and Section 326 of the Communications Act precludes the Commission from censoring broadcasters' program choices or from otherwise playing any role in the selection of broadcast content.²⁵ The Supreme Court has recognized the degree to which Congress has directed the Commission to steer clear of oversight of broadcast news – “Congress intended to permit private broadcasting to develop with the widest journalistic freedom,” and – since it is not physically possible to provide time for all viewpoints – “the right to

²⁴ See, e.g., *Petition*, at 4, 6, 8, 9 and 11.

²⁵ See 47 U.S.C. § 326 (2005) (“Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.”).

exercise editorial judgment was granted to the broadcaster.”²⁶ Moreover, the legislative history of both the 1927 Radio Act and the Communications Act are replete with evidence of a “legislative desire to preserve values of private journalism” even under a regulatory scheme “which would insure fulfillment of certain public interest obligations.”²⁷

When it comes to news coverage, the Commission has been especially sensitive to the constitutional limits established by the Founding Fathers. Even as broadcasters are required to serve the public interest by providing locally responsive programming, the Commission assiduously has sought to avoid oversight of editorial choices. “The general rule is that we do not sit to review the broadcaster’s news judgment, the quality of his news and public affairs reporting, or his taste.”²⁸ Thus, the Commission dismissed complaints about the editorial choices that broadcast stations made in their news coverage of the volatile Democratic National Convention and related protests in 1968.²⁹ The decision made clear that “it is not the proper concern of this Commission why a licensee” presents one particular story in lieu of another.³⁰ “Such

²⁶ *Columbia Broadcasting System v. Democratic National Committee, et.al.*, 412 U.S. 94, 110-11 (1973).

²⁷ *Id.* at 105, 109.

²⁸ *In re Complaints Concerning Network Coverage of the Democratic National Convention*, 16 F.C.C. 2d 650, 654 (1969).

²⁹ *See id.*

³⁰ *Id.* at 655.

choices are not reviewable” as they are “matters for the journalistic judgment” of the stations.³¹

On this basis, the Commission has repeatedly rejected petitions to deny renewal applications that allege fault regarding a station’s news coverage. Most recently, the Commission in 1998 rejected a petition to deny filed by Media Watch, a citizen’s group which alleged that Denver, CO television stations’ local news coverage was inadequate.³² Media Watch claimed that the stations’ news coverage focused too heavily on violent topics, and that as a result, “other news important to the community [including local election coverage] [was] not being covered.”³³ The Commission concluded, however, that Media Watch failed to establish a prima facie case that grant of the renewal applications would disserve the public interest since “licensees are afforded broad discretion in the scheduling, selection and presentation of programs aired on their stations, and Section 326 of the Communications Act and the First Amendment of the Constitution prohibit any Commission actions which would improperly interfere with the programming decisions of licensees.”³⁴

³¹ *Id.* Moreover, the Commission has informed the public: “Under the First Amendment and the Communications Act, the FCC cannot tell stations how to select material for news programs” *The Public and Broadcasting*, Federal Communications Commission, June 1999.

³² *See Letter to Dr. Paul Klite, et. al.*, 12 Comm. Reg. (P&F) at 82.

³³ *Id.* at 81.

³⁴ *Id.*; *see also In re John Neely, Esq.*, 2007 WL 1246137 (2007) (“the Commission will not take adverse action on a license renewal application based upon the subjective determination of a listener or group of listeners as to what constitutes appropriate programming”).

Similarly, the Commission granted a station's renewal application over the objection of a local citizens group (the Community Coalition for Media Change) which claimed that the station "censor[ed]" news coverage of important local issues.³⁵ The group submitted to the FCC a list of local media events that it said the station failed to cover.³⁶ The Commission made clear, however, that "[t]he choice of what is or is not to be covered in the presentation of broadcast news is a matter committed to the licensee's good faith discretion."³⁷ Absent extrinsic evidence that a licensee deliberately sought to suppress coverage of a particular issue for its own private gain, the "Commission will not review the licensee's news judgments."³⁸ The mere fact that the licensee chose to focus on news that "did not correspond with" the issues deemed important by the petitioner "does not warrant further action by the Commission" since "a licensee is under no obligation to cover each and every newsworthy event which occurs within a station's service area."³⁹

In the end, someone must make the difficult choices about what to cover and what to exclude, and with respect to television stations, the Constitution and Congress have bestowed that right on licensees. In this regard, the Supreme Court has recognized that it is simply not feasible to permit "every potential speaker" to serve as the

³⁵ *In re American Broadcasting Companies, Inc.*, 83 F.C.C. 2d at 303.

³⁶ *See id.* at 305.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* *See also In re License Renewal Applications*, 5 FCC Rcd at 3848 (Commission rejecting petition to deny multiple renewal applications based on allegations that licensees failed to broadcast sufficient issue-responsive programming targeted toward minority viewers).

“‘judge’ of what the listening public ought to hear”⁴⁰ For better or worse, the Court said, “editing is what editors are for; and editing is [the] selection and choice of material.”⁴¹ That the First Amendment also is designed to protect the rights of individual speakers, or even that it plays a vital role in ensuring the expression of diverse viewpoints, is beside the point. “To agree that debate on public issues should be ‘robust and wide-open’ does not mean that we should exchange ‘public trustee’ broadcasting, with all its limitations, for a system of self-appointed editorial commentators.”⁴²

In short, the *Petition* makes a plea for government oversight of news content that is indistinguishable from the claims of Media Watch and the Community Coalition for Media Change, which the Commission soundly rejected. Consistent with this clear and decisive precedent, and the strictures of the First Amendment, the Commission should reject the *Petition* for failing to make a prima facie showing that WWOR-TV has not served the public interest.

D. The Petitioners Misapprehend the Legal Standard Applicable to Review of WWOR-TV’s License Renewal Application

The *Petition* also suffers from a fatal flaw in its legal reasoning. The Petitioners repeatedly assert that the Commission has “specifically imposed special obligations” on WWOR-TV, and that the station has “additional, unique obligations to

⁴⁰ *Columbia Broadcasting System*, 412 U.S. at 124.

⁴¹ *Id.*

⁴² *Id.* at 125. Even under the now defunct “fairness doctrine,” courts acknowledged that “[n]o broadcaster [could] present all colorations of all available public issues. . . . Choices have to be made and . . . the choices must be made by those whose mission it is to inform, not by those who must rule.” *See National Broadcasting Co. v. FCC*, 516 F.2d 1101, 1113 (D.C. Cir. 1974).

New Jersey.”⁴³ The Petitioners twice cite language from the FCC order granting the station permission to relocate to New Jersey: “we expect [the licensee] to perform a higher degree of service to this Grade B coverage area than is normally required of a licensee.”⁴⁴ The *Petition* insinuates that this language compels the Commission to hold WWOR-TV’s renewal application to a heightened standard of review.

The Commission, however, already has had opportunity to consider and reject this very argument. In reviewing an application seeking consent to the sale of WWOR-TV in 1986, the Commission was presented with a challenge asserting that the station’s programming had failed to serve the needs and interests of New Jersey residents.⁴⁵ The petitioners in that case specifically cited the same language relied upon by the Petitioners here to claim that WWOR-TV “assumed a higher obligation to be responsive to the issues and concerns of the service area than would be the case for a licensee serving any other area.”⁴⁶ The Commission disagreed, finding WWOR-TV’s “higher obligation” extends only to balancing service between its city of license and other areas within the station’s Grade B contour.⁴⁷ The FCC made clear that WWOR-TV’s “obligation to serve the issues and concerns of northern New Jersey is not different in kind or degree from any licensee’s obligation to serve its community of license,”⁴⁸ and

⁴³ *Petition*, at 2, 4, 13, 15-16.

⁴⁴ *Id.* at 4, 16.

⁴⁵ *See RKO General, Inc.*, 1 FCC Rcd at 1086.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 1087.

concluded that WWOR-TV's "performance should be judged in the same manner as any other television station in it[s] overall performance, except that its performance will be tied to northern New Jersey, not primarily Secaucus."⁴⁹

To the degree that the Petitioners are complaining about the specific amount of New Jersey programming carried by WWOR-TV, the Commission also has emphatically rejected a "quantitative approach" to analyzing licensee performance.⁵⁰ Rather, licensees have broad discretion to select the specific types and amounts of programming necessary to respond to community needs. More specifically, the Commission has refused to find that WWOR-TV should be entitled to less latitude than a typical station in the exercise of reasonable editorial discretion. "Our review of [WWOR-TV]'s programming need be no more extensive than we generally undertake in reviewing whether the issues and concerns of a particular service area have been met."⁵¹ Thus, "[j]ust as we would not purport to tell a licensee of New York City how much coverage it should devote to New York high school sports, neither will we intrude in the editorial discretion of a New Jersey station."⁵²

Only if they had demonstrated that WWOR-TV provided "nominal" programming responsive to New Jersey could the Petitioners meet their extremely high burden to establish a prima facie case against the station's renewal application. But given

⁴⁹ *Id.* at 1086.

⁵⁰ *RKO General, Inc.*, 1 FCC Rcd at 1087 (citing *In re Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C. 2d 1076, 1093-94 (1984)).

⁵¹ *Id.*

⁵² *Id.* at 1088.

the extraordinary breadth of issue-responsive programming detailed in WWOR-TV's issues/programs lists, the Petitioners necessarily have failed to meet their burden and the *Petition* must be dismissed.

III. SETTING ASIDE THE SERIOUS CONSTITUTIONAL IMPLICATIONS OF CONTENT REVIEW, THE PETITIONERS' ALLEGATIONS STILL FAIL TO RAISE A SUBSTANTIAL AND MATERIAL QUESTION ABOUT WWOR-TV'S LEVEL OF SERVICE TO NEW JERSEY

Given the First Amendment limitations, it is entirely inappropriate for the Commission to undertake a review of a broadcast station's editorial choices. But even if the Commission were to consider the merits of the Petitioners' specific arguments, it would find that the *Petition* nonetheless utterly fails to raise any substantial or material questions that would warrant a hearing.

A. The Petitioners' Own Data Confirms That Fox Has Broadcast Substantial Amounts of Issue-Responsive Programming to New Jersey Residents

As noted above, Petitioners essentially raise three charges against WWOR-TV's service: 1) the station allegedly failed to provide a sufficient amount of election coverage; 2) the station's issues/programs lists allegedly reflect an insufficient quantity of news coverage; and 3) the station's newscasts during approximately 12 days in April 2007 allegedly contained too few New Jersey-centric stories.⁵³ Even accepting the Petitioners' own facts and data, however flawed they may be, there can be no question that Fox has provided abundant issue-responsive programming to New Jersey residents. The *Petition* itself contains more than sufficient information to confirm that WWOR-TV has broadcast a substantial amount of programming specifically focused on

⁵³ See, e.g., *Petition*, at 2.

New Jersey.⁵⁴ At the same time, however, the Petitioners' attempts to characterize WWOR-TV's service as deficient suffer from a variety of critical flaws.

1. The Eagleton Study

First, the *Petition* cites to a study prepared by the Eagleton Institute of Politics at Rutgers University, which attempted to measure news coverage of the November 2005 New Jersey state elections on certain broadcast and cable television channels during a 30-day window leading up to election day.⁵⁵ The Petitioners argue that these elections were "particularly critical" to New Jersey in part because of two "closely contested and visible" federal Congressional races.⁵⁶ The November 2005 election, however, did not include any races for the United States Congress (which occur only in even-numbered years).⁵⁷ In any event, the Petitioners suggest that the study finds WWOR-TV to have been deficient in its coverage of New Jersey politics.

The study itself, though, explicitly states that it was "not designed to provide an analysis of **all** local news programming available to New Jersey residents Nor does it include special election news programming . . . or interview programs shown on" weekends.⁵⁸ It therefore does not even attempt to evaluate all political coverage

⁵⁴ See *id.* at Exhibits A-D.

⁵⁵ See *id.* at 4; see also *id.* at Exhibit A.

⁵⁶ See *id.* at 4.

⁵⁷ The *Petition* also erroneously reports that only 67 percent of WWOR-TV's election stories covered by the study were directly related to New Jersey. But as the *Petition* recognizes, 10 of the station's 13 stories focused on New Jersey races – which totals 77 percent. See *id.* at 5.

⁵⁸ See *Television Coverage of the 2005 New Jersey Election: An Analysis of the Nightly News Programs on Local New Jersey, New York and Philadelphia*